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In the Supreme Court of the United States

No. 301, October Term, 1961

GEORGE WEIGEL,

Petitioner,

v.

PARTENWEEDEREI, MS BELGRANO and RUDOLPH A. OETKER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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In the Supreme Court
of the United States

No. , OCTOBER TERM, 1961

GEORGE WEIGEL,

Petitioner,

v.

PARTENWEEDEREI, MS BELGRANO and RUDOLPH A. OETKER,

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled case on February 8, 1962.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court on the issue of liability as between petitioner and respondents (R. 16-36), printed in appendix A hereto, *infra*, p. 31, is reported in

189 F. Supp. 103. The opinion of the District Court on the issue of indemnity between respondents and a third-party (R. 38-52), printed in Appendix A hereto, *infra*, p. 46, which issue is not involved in this petition, is reported in 188 F. Supp. 605. The opinion of the Court of Appeals (R. 589-599), printed in Appendix A hereto, *infra*, p. 17, is reported in 299 F.2d 897. The orders of the Court of Appeals (R. 603-604), holding in abeyance further proceedings between respondents and third-party pending determination of this cause in this Court are reported at 302 F.2d 730.

JURISDICTION

The judgment of the Court of Appeals was entered on February 8, 1962 (R. 588). A timely petition for rehearing was filed and was denied on March 12, 1962 (Supplemental Transcript of Record). On May 4, 1962, by order of the Chief Justice, the time within which a petition for certiorari might be filed was extended to and including August 9, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Is a longshoreman working on the dock, engaged in moving cargo under the ship's tackle to be loaded aboard the vessel, entitled to a warranty of the seaworthiness of the vessel? (The Court of Appeals held that he is not.)

2. Does a workman claiming the benefit of the war-

ranty against unseaworthiness have the burden of introducing evidence to prove that the work he did was traditionally done by seamen? (The Court of Appeals held that petitioner had failed to meet his burden of proof, and reversed the trial court's finding that petitioner was performing a part of the ship's service in loading her cargo.)

3. Does a shipowner owe a duty to a longshoreman working on the dock, engaged in moving cargo under the ship's tackle to be loaded aboard the vessel, to provide him with a safe place to work? (The Court of Apeals held that the ship owner owed no duty to provide petitioner with a safe place to work.)

4(a). Was the Court of Appeals correct in holding that there was no evidence to sustain the trial court's finding of fact that the shipowner was negligent in failing to make a proper inspection of the appliance which cause the injury to the petitioner?

(b). Is the decision of the Court of Appeals in conflict with the subsequent decision of this Court in *Salem* v. *United States Lines* — U.S. —, 8 L. Ed. 2d 313 (May 28, 1962) in holding that the petitioner was obligated to introduce evidence to establish a standard of inspection?

STATEMENT

On October 10, 1958, petitioner was employed as a longshoreman (R. 472) by a stevedore company engaged in loading and discharging cargo for the M. V. Bel-

grano (R. 5), a ship lying in navigable waters of the United States (R. 4). Petitioner was assigned to a gang at hatch no. 2 (R. 229). He was driving a tractor on the dock, delivering a carload of lumber under ship's tackle for loading aboard the vessel (R. 472, 477), when one of the ship's booms at hatch no. 1 fell (R. 89), striking him and causing him severe injuries (R. 24).

Petitioner instituted this action in admiralty in the United States District Court for the District of Oregon as a libel in rem against the vessel and in personam with foreign attachment against the shipowner (R. 4, 5). The District Court had jurisdiction of the cause as an admiralty matter by reason of the provisions of c. 646, 62 Stat. 931, amended May 24, 1949, c. 139, § 79, 63 Stat. 101, 28 U.S.C. § 1333; and by c. 526, 62 Stat. 496, 46 U.S.C. § 740, extending the admiralty jurisdiction to include cases of damage to person occurring on land, when caused by a vessel on navigable water. The operating manager of the vessel appeared as claimant (R. 4). The shipowner and the claimant (hereinafter "respondents") impleaded the stevedore company as a third party, claiming indemnity (R. 4).

The trial court, Hon. William G. East, wrote an opinion (R. 16-36) holding that petitioner was entitled to prevail, and entered a decree which awarded him damages of $41,207.55 (R. 36-38). In a subsequent opinion, the court decreed that respondents were entitled to indemnity from the third party (R. 38-52).

The trial court found that the falling of the boom

was caused by the failure of a pawl and ratchet device to operate properly, because the pawl was stuck tight and failed to fall freely into the notch provided for it, as it was supposed to do (R. 21-22). He therefore found the vessel unseaworthy. He also found that "petitioner at the time of the accident was engaged in performing a part of the ship's service as a longshoreman in the process of loading and stowing her cargo" (R. 22-23), and was entitled to a warranty of the seaworthiness of the vessel.

The evidence regarding the condition of the pawl (also referred to as a dog) at the time of the accident on October 10 is not now in dispute. It was not functioning properly (R. 184-187). When the boom is being raised, the clicking sound which should be made by the pawl, if operating properly, is clearly audible (R. 184-187).

The pawls were all in good working order and fell freely into the notches on October 6 and 7, when the vessel was in Vancouver, B. C. (R. 525, 562). From Vancouver, the vessel proceeded to Portland, where it arrived early on the morning of October 9. On that day, the boom in question was raised by members of the crew. They testified that it operated properly and they could hear the click (R. 467, 468; 515, 517). Later that same morning, however, when the longshoremen working that hatch had to move the boom, they found the pawl jammed stuck so tight that it could not be moved by hand, and had to use a 2"x4" to pry it down into the ratchet (R. 84-85, 130).

Nothing further was done about the condition of the pawl, however, and petitioner was hurt when the boom was raised on the following day, and the pawl failed to drop into place (R. 184-187). The trial court concluded that, "Reasonable inspection would have disclosed the malfunctioning of the pawls known to the longshoremen the day before" (R. 22).

Respondents and the third party both appealed to the Court of Appeals for the Ninth Circuit which reversed the judgment in favor of petitioner (R. 599). A timely petition for rehearing was denied without opinion (Supp. Tr.). Subsequently, the Court of Appeals entered Orders suspending further proceedings on the indemnity issue pending the outcome of the instant petition for certiorari (R. 603-604).

On appeal, the finding of the trial court that the vessel was unseaworthy was not challenged by the respondents (R. 592). The Court of Appeals held that petitioner, as a dock-working longshoreman, who "did not participate in loading the lumber onto the vessel or in stowing it" (R. 595), was engaged in "an operation preliminary to, but separate from the work of loading lumber onto the vessel." (R. 595). As such, he was held not entitled to the benefits of the warranty against unseaworthiness (R. 596). The Court of Appeals also held, without intending "to lay down a fixed line of demarcation between 'seamen's work' and 'shoreside work'," that the burden was upon petitioner to prove that the type of work he was doing was traditionally done by seamen, and that he had failed to meet that burden (R. 596).

On the issue of negligence, the Court of Appeals held that the shipowner had no duty to provide the petitioner with a safe place to work (R. 599), and that there was no evidence to support the trial court's finding of fact regarding inspection (R. 599).

REASONS FOR GRANTING THE WRIT

Importance of Question Presented

The correctness of this Court's decision in *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, holding that the benefits of the doctrine of seaworthiness are available to persons doing the work of seamen, has been much debated, but no one questions the importance of the doctrine to those whom it affects. This case squarely presents the question of whether the protection of that doctrine is to be available to a substantial class of workmen; namely, those who participate in the process of loading (or unloading) the vessel by transporting cargo between its last place of rest and ship's tackle. The trial Court found that petitioner was entitled to a warranty of seaworthiness because he was engaged in the work of loading the vessel, but the Court of Appeals held that the work he was doing was "preliminary to, but separate from" loading.

The question is peculiarly important to those affected because workmen injured ashore by an unseaworthy condition of a vessel are not entitled to the protection of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq. Instead, they are relegated to the varying and frequently inadequate remedies af-

forded by state law,[1] although their injuries are subject to the maritime and admiralty jurisdiction by 46 U.S.C. § 740.

Because state compensation is often inadequate, a third-party recovery is a matter of the utmost concern to a workman injured on the dock. As exemplified in this case, in which unseaworthiness of ship's gear is admitted, but the Court of Appeals holds that there is no evidence of negligence, the protection of the doctrine of unseaworthiness is frequently crucial to recovery.

We are thus dealing with an issue of law—namely, is a dock-working longshoreman entitled to the warranty—which is of major importance to a substantial number of workmen. This Court, in *O'Donnell* v. *Great Lakes Dredge & Dock Co.*, 318 U.S. 36, deemed an analogous issue arising under the Jones Act, 46 U.S.C. § 688, to be of sufficient consequence to justify the granting of certiorari. Similar considerations justify the granting of the writ in the instant case.

In addition to the question whether petitioner is entitled to the benefits of the warranty, the decision below has wider implications, raising fundamental ques-

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[1] In this case, for example, petitioner suffered serious and permanent injuries, which were not totally disabling (R. 24-25). They were of such a nature as to be rated as unscheduled injuries under both the State and Federal Compensation Acts. Had petitioner been covered by the Federal Act, the maximum amount he could have received for his permanent injury was at that time $17,280.00, and is now $24,000.00. 33 U.S.C. Sec. 914 (m). Under the applicable Oregon statute, the maximum which can be awarded for an unscheduled permanent partial disability is $6,742.50. ORS 656.214 (2), (4).

tions concerning the applicability of the doctrine which have not yet been decided by this Court. In *Halecki* v. *United N. Y. & N. J., etc.*, 358 U.S. 613, this Court held that the plaintiff was not entitled to the protection of the doctrine, because he was not doing work traditionally performed by seamen. The opinion fails to suggest the criteria to be used in determining that issue.

In this case, the Court of Appeals holds that the burden was on petitioner to prove—presumably by oral, expert testimony—that he was engaged in work traditionally done by seamen (R. 596). The Court of Appeals comments that the uncontradicted expert testimony was to the contrary (R. 595). It refers to testimony introduced by the third party that, in the period since 1910, seamen did not work beyond ship's tackle (R. 473, 483, 493).

If the applicability of the warranty to a particular task is to be determined by expert testimony, as a disputed issue, the consequences to litigation in this field are extreme. There is no reason why every case should not become a battleground of expert testimony concerning the traditional work of seamen. If the defendants can produce witnesses to testify that seamen did not "traditionally" do the work of loading and unloading the vessel (*Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85), of carpentry aboard the vessel (*Pope & Talbot* v. *Hawn*, 346 U.S. 406) and the numerous other employments which have been held by lower courts to be entitled to the warranty as a matter of law, it will be a jury question in every case, based upon conflicting

testimony, whether the doctrine applies.[2]

If it is to be the rule that the workman must prove that his work was "traditionally done by seamen," it is clearly necessary that some content be given to that phrase. What is meant by "traditional" in this context? One commentator suggests that the period from 1910 to 1920 should be adopted as the index (Norris, Maritime Personal Injuries, § 48A, pp. 122-125 (1959)), and the evidence introduced by third party in this case was apparently based upon that suggestion (R. 473, 483, 493). This Court, however, by its citations in *Sieracki* to *Florez* v. *The Scotia*, 35 F. 916 (D.C.) and *The Seguranca*, 59 F. 908 (D.C.), as well as by its decisions in *International Stevedoring Co.* v. *Haverty*, 272 U.S. 50, 52, and *Atlantic Transport* v. *Imbrovek*, 234 U.S. 52, 62, evidently had reference to a period of time at least well before the turn of the century. But if the issue of "tradition" is to be one of fact, some standard against which evidence can be judged must be supplied.

In a closely parallel context, that of determining who is a member of a crew of a vessel, so as to be entitled to a cause of action under the Jones Act, this Court has taken a different approach. The issue of membership in a crew has been held to be one of fact, but is determined upon the basis of duties and functions of

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[2] The ready availability of such testimony is illustrated by *Litwinowicz* v. *Weyerhaeuser SS Co.*, 179 F. Supp. 812, 818 (E.D. Pa., 1959), in which, more than a decade after *Sieracki*, the defendant submitted a memorandum "which purports to demonstrate 'the fallacy of the rather widely held concept that the work which is today performed by longshoremen was formerly performed by members of the crew.'"

the injured workman, rather than upon expert testimony as to who was "traditionally" a member of a crew. *Senko* v. *Lacrosse Dredging Corp.*, 352 U.S. 370; *Butler* v. *Whiteman*, 356 U.S. 271. This appears to be the line of approach taken by the trial court here. He concluded (R. 22-23):

> ". . . [T]hat the libelant at the time of the accident was engaged in performing a part of the ship's service as a longshoreman in the process of loading and stowing her cargo. Particularly he was engaged in moving or bringing this lumber cargo from its last place of rest following handling by others to a position on the dock shipside in order to be reached by the ship's gear and tackle."

The test of what constitutes a ship's service appears to be a logical one to adopt in determining the work traditionally done by seamen. It is the test suggested by the language of *Sieracki* (328 U.S. at 93-97), which repeatedly adverts to the fact that unseaworthiness liability arises "as an incident . . . of performing the ship's service with the owner's consent." See also, *Crumady* v. *J. H. Fisser*, 358 U.S. 423.

For its statement that, "historically the work of loading and unloading is the work of the ship's service," the Court in *Sieracki* cited early decisions on maritime liens, which adopt a similar criterion. If the work done for the vessel is maritime in nature, it gives rise to a lien; if not, it does not. And whether the work is maritime in turn depends upon performing a service for the vessel with the owner's consent, even if performed on land, as in *The Seguranca*, 58 F. 908 (D.C.) or *The Onore*, 6 Ben. 564; Fed. Cas. No. 10,538.

The decision of the Court of Appeals in this case could introduce serious confusion into this area of litigation. Even though petitioner proved to the satisfaction of the trier of fact that he was performing the ship's service in loading the vesel, he was held not entitled to recover because he failed to introduced any evidence as to what seamen "traditionally" did. So far as petitioner's research has disclosed, no opinion of this or any other court has required such evidence. If such evidence is to be required, what is the criterion by which it should be judged? The Court of Appeals gives no indication what evidence would meet this burden it imposes.

Conflict with Decision of this Court

The principal reason for overturning the trial court's finding of negligence appears to be that petitioner did not introduce expert testimony to establish a standard of conduct for inspection (R. 598). The device which failed was a simple one (R. 64-65), pictured in Figure 2 of the trial court's opinion (R. 26) (189 F. Supp. at p. 105) following p. 40 of the Appendix, *infra*. When the pawl fell into the notches, as it was supposed to do, the drum could not turn and the boom could not fall. The pawl was jammed, and had been jammed for more than a day. If it was jammed, the fact should have been immediately apparent when the boom was raised the previous day. The trial court determined that the respondent should have discovered the defect. It is submitted that this was within his province, and that the decision of the Court of Appeals to

the contrary is directly in conflict with the decision in *Salem* v. *U. S. Lines*, — U.S. —, 8 L. ed. 2d 313 (May 28, 1962).

In that case, the Court held that where a simple device was involved, expert testimony was not necessary to enable a jury to decide whether it was reasonably safe for use, and, if there were reasons not immediately apparent, which prevented making the device safe, the burden was upon the defendant to establish them.

Precisely the same rule should apply. The trial court, fully understanding the nature of the device in question, held that a reasonable inspection should have disclosed its malfunctioning, known to the longshoremen the day before (R. 22). He was entitled to reach this conclusion without the aid of expert testimony. He could, for example, have concluded that it was the duty of the seamen to make inquiry of the longshoremen regarding the condition of this safety device.

Conflicts in Principle with Decisions of Other Courts of Appeal

Every other Court of Appeals which has considered the applicability of the doctrine of unseaworthiness to longshoremen engaged in loading or unloading the vessel, but working on the dock, has concluded that the doctrine is applicable. *Strika* v. *Netherlands Ministry of Traffic*, 185 F.2d 555, 556-558 (C.A. 2, 1950); cert. den. 341 U.S. 904; *Hagans* v. *Farrell Lines*, 237 F.2d 477 (C.A. 3, 1956); *Klimaszewski* v. *Pacific-Atlantic Steamship Co.*, 246 F.2d 875 (C.A. 3, 1957) (longshoreman on barge); *American Export Lines, Inc.* v. *Revel*, 266 F.2d

82, 86 (C.A. 4, 1959). A completely different panel of the Ninth Circuit went out of its way to hold that the doctrine was applicable to a dock-working longshoreman, whether aboard the ship or on the dock. *Pope & Talbot, Inc.* v. *Cordray*, 258 F.2d 214, 217-218 (C.A. 9, 1958).

The District Courts have been equally unanimous. *Valerio* v. *American President Lines*, 112 F. Supp. 202 (S.D. N.Y., 1952); *De Van* v. *Pennsylvania Railroad Co.*, 167 F. Supp. 336, 342 (E.D. Pa., 1958) (longshoreman on carfloat); *Di Salvo* v. *Cunard Steamship Co.*, 171 F. Supp. 813, 819 (S.D. N.Y., 1959); *Litwinowicz* v. *Weyerhaeuser Steamship Co.*, 179 F. Supp. 812 (E.D. Pa., 1959); *Robillard* v. *A. L. Burbank & Co.*, 186 F. Supp. 193, 195-196 (S.D. N.Y., 1960). See also, *McKnight* v. *N. M. Patterson, Ltd.*, 181 F. Supp. 434, 438, n. 5 (N.D. Ohio, 1960) (dictum).

Because of the ambiguous nature of the decision here, it cannot be said to be squarely in conflict with any of the foregoing. The Ninth Circuit refrained from laying down a "fixed line of demarcation" between seamen's work and shoreside work; instead it appears to distinguish between those to whom the warranty is available as a matter of law, and petitioner, who was beyond the pale because he had not *proved* that he was entitled to the protection of the warranty.

Insofar as none of the foregoing decisions appears to have required a dock-working longshoreman to prove that his work was traditionally that of seamen, it may be said that this decision is in conflict. Since it is entirely

impossible to tell from the opinion of the Court of Appeals what evidence petitioner lacked or whether any amount of evidence would have changed its opinion, little more can be said concerning conflict, except that a reading of all the foregoing opinions cannot help but leave the impression that the Courts of Appeal above cited would not have arrived at the result reached in this case.

Two recent decisions of District Courts in the Third Circuit appear to present direct conflicts with the decision here. *Hagans* v. *Ellerman & Bucknall Steamship Co.*, 196 F. Supp. 593 (E.D. Pa., 1961), is presently pending on appeal and is expected to be argued in the fall. Plaintiff there worked beyond the reach of ship's tackle, but the court held that he was in the ship's service and was entitled to a warranty of seaworthiness. It does not appear that there was any evidence introduced that members of the crew in former times did the type of work which plaintiff there was doing.

The other case, *Fitzmaurice* v. *Calmar S. S. Co.*, 198 F. Supp. 304 (E.D. Pa., 1961), is awaiting trial, and also involved a longshoreman working beyond the reach of ship's tackle.

The Decision Below Is Erroneous

Enough has already been said to indicate generally the errors which petitioner asserts that the Court of Appeals has committed. If the question of whether or not petitioner was entitled to the warranty is one of fact, the trial court's factual decision that petitioner

was engaged in the ship's service in loading its cargo is amply supported by evidence. If it is one of law, the Court of Appeals is in error in holding that the petitioner failed to meet his burden of proof. In any event, neither in the *Sieracki* case, nor in subsequent cases, has it been necessary for a shore-based workman claiming the benefits of the doctrine of unseaworthiness to introduce expert testimony as to the traditional work of seamen. The suggestion that such a battle of experts is necessary to decide an issue of this kind is an extremely undesirable development of the law in this area.

On the issue of negligence, the Court of Appeals has once again invaded the trial court's domain, to hold that he could not reasonably have decided that respondent should have discovered the defect, because he had no expert testimony to establish the standard of conduct. The error in this ruling has already been discussed. Respondent could have discovered the defect itself, or could have made inquiry of the longshoremen who knew of it.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

CLIFFORD D. O'BRIEN,
Counsel for petitioner.

July 30, 1962

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PARTENWEEDEREI, MS BELGRANO, and RUDOLPH A. OETKER,
Appellants,
vs.
GEORGE WEIGEL,
Appellee.

No. 17,178
Feb. 8, 1962

BRADY-HAMILTON STEVEDORE COMPANY,
Appellant,
vs.
PARTENWEEDEREI, MS BELGRANO, and RUDOLPH A. OETKER,
Appellees.

On Appeal from the United States District Court for the District of Oregon

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Before: JERTBERG, KOELSCH and DUNIWAY, Circuit Judges

JERTBERG, Circuit Judge:

George Weigel, libelant below, and appellee here, hereinafter called "libelant," was an employee of Brady-Hamilton Stevedore Company, hereinafter called "Stevedore," and acting within the course and scope of his employment when he was struck by a boom of the vessel BELGRANO, as he was operating a tractor in reverse motion and pulling with a towline a railroad car, then loaded with lumber, upon a permanently fixed railroad spurline on the dock along shipside for the

purpose of placing the lumber under and within reach of the vessel's loading gear.

Libelant instituted his libel in admiralty, in rem against the vessel and in personam against its owner and operator, respondents below and appellants here, hereinafter collectively called "respondents." The respondents denied liability and impleaded Stevedore as third-party libelant under Admiralty Rule 56 in a cause of indemnity.

The question of the claim of respondents against Stevedore for indemnity was segregated and reserved until adjudication of libelant's claim against respondents.

Following trial on the segregated issue of liability on libelant's claim and the nature and extent of his damages, the District Court entered judgment in favor of libelant from which judgment respondents appeal.

Following trial on the segregated and reserved issue of indemnity, the District Court entered judgment to the full extent of libelant's judgment, in indemnity against Stevedore, from which judgment Stevedore appeals.

We will first consider respondents' appeal. The judgment in favor of libelant was based upon the findings and conclusions of the District Court that

> (1) The vessel was unseaworthy in that her topping "lift gear" for the starboard boom at No. 1 hatch malfunctioned and permitted the boom to fall upon the libelant because the pawls on the ratchet in the topping "lift gear" were defective and inadequate in that they did not drop into each cog as the boom was hoisted so as to prevent the boom from falling, and that at the time of the accident

libelant was engaged in performing a part of the ship's service as a longshoreman in the process of loading and storing her cargo;

(2) The respondents were negligent in:

(a) Failing to properly inspect the vessel and particularly the ratchet and pawl device to the hatch to determine the defective nature of same, since a reasonable inspection would have disclosed the malfunctioning of the pawls; and

(b) Failing to provide the libelant with a safe place to work.

The District Court further concluded that the unseaworthiness of the vessel and the concurring negligence of the respondents were the proximate causes of the falling of the boom and libelant's resultant injuries.

A detailed description of the mechanical features of the gear which operated the boom, the principles of its functioning while operating properly, the effects of its malfunctioning and the human and mechanical factors which caused the boom to fall, would unduly and unnecessarily extend this opinion. For details concerning such matters, we refer the interested reader to the opinion of the District Court reported at 189 F Supp. p. 103 (Apr. 14, 1960), which opinion also constitutes the findings of fact and conclusions of law of the District Court.

The facts surrounding the accident are stated in the opinion (p. 107), as follows:

"Immedately prior to the commencement of the operation leading up to the accident, the ratchet notches and the pawls were in a locked position and the lift gear was steady under the weight of the boom. The work of bringing aboard the lumber at No. 1 hatch required a topping of the boom in

order to place the same in a working postion, and the winch driver called to a ship longshoreman and asked for 'a hand' in attaching the free end of the pigtail line to the gypsy head. The winch operator did not see this operation, and the longshoreman involved can give no satisfactory account of what he did in the way of fixing the free end of the pigtail line to the gypsy head. In any event, it was somehow attached, but evidently not properly. The winch driver took up the slack in the pigtail line, put strain thereon, and commenced the lifting of the boom. The winch driver did not hear the 'clanking of the pawls (dropping of the pawls in the notches in the ratchet rims). After raising the boom approximately three-four feet, the driver stopped the winch, braked it, and started astern to see what was wrong. Under the weight of the boom, the pigtail line started to slip on the gypsy head and the boom lift wire rope on the drum of the lift gear started to unwind. The boom in its fall gathered momentum, and the flailing free end of the pigtail line prevented the winch driver from manually putting stress upon the same. The boom, uncontrolled, fell to the starboard side of the vessel across the dock and struck the libelant. From the commencement of the raising of the boom, the unwinding of the drum, and throughout the fall of the boom, the pawls had failed to fall into the notches by gravity or otherwise.

"On the day before the accident, while in the process of topping the boom involved through the use of the lift gear, the pawls had locked in an upright position and failed to properly function by falling under gravity into the locking position, and a longshoreman had used a piece of dunnage to strike and knock the pawls into position."

Before considering the errors urged upon us by the respondents, we should state that respondents concede that the finding of fact of the District Court that the

vessel was unseaworthy in that the pawls were stuck and failed to operate properly, is supported by ample evidence. Such finding is not challenged on this appeal by respondents or Stevedore.

Respondents' contentions are: (1) The District Court erred as a matter of law in concluding that libelant was entitled to the warranty of unseaworthiness; and (2) The conclusion of the District Court that the respondents were negligent in the respects above stated is without evidentiary support and clearly erroneous.

In holding that libelant was engaged in performing a part of the ship's service and, therefore, entitled to the protection afforded seamen, the District Court relied squarely upon the opinion of this Court in *Pope & Talbot, Inc.* v. *Cordray*, 258 F. 2d 214 (9th Cir. 1958). In the *Cordray* case, a longshoreman was injured while the ship was at dock and engaged in discharging its cargo. The shipowner had contracts with two stevedoring companies in the cargo operation. The contract with one stevedoring company covered the operations pertaining to the discharge of cargo from the ship's hold to the ship's side at the dock. The contract with the other stevedoring company covered the operations pertaining to the moving of cargo from the ship's side to place of rest on the dock. Cordray was an employee of the second mentioned stevedoring company and was a foreman of the dock longshoremen. It was one of his duties to see that the cargo was moved to its first place of rest from the ship's tackle, and it was his duty also to coordinate the activities of the dock working longshoremen with those of the ship working longshoremen in order to have terminal employees and equipment

available at the end of ship's tackle to keep the cargo moving. While most of the work of Cordray was done upon the dock, the evidence showed that Cordray was aboard the vessel at the time of his injury for the purpose of coordinating the cargo handling work of the dock longshoremen with that of the longshoremen working on the ship. The accident to Cordray happened when he went on board the ship to ascertain whether the gang of longshoremen on the ship were going to go home or shift to another hatch, so that Cordray could determine whether or not he would keep his dockside longshoremen available to continue work. In the course of the opinion (pp. 217-18), this Court stated:

> "[2] In the instant case the appellee, although performing most of his work on the dock in the moving of the ship's cargo from ship's tackle to its first place of rest (which was part of the ship's obligation), was on board the ship when the accident happened. Under the testimony, he was coordinating the unloading of the cargo from the ship's hold to its place of rest on the dock. We hold that the duty of providing a seaworthy ship and gear at the time of this accident extended to the appellee, whether or not appellee was on board the ship or on the dock. The test is, what was the nature of his work? He was performing a service for the ship in the discharge of its cargo. His employer was under contract wth the shipowner to take the cargo from the shipside and to put it in a place of storage, and appellee was engaged in the performance of this work. The appellee's work was the work of a longshoreman and he was entitled to seaworthy gear while he was performing his service." [Footnotes omitted.]

During the trial of that case, counsel for the shipowner stipulated, "* * * that it is part of the obligation of the

steamship company as carrier to not only raise the cargo out of the hold and land it on the dock, but also to place it in the warehouse." Further, it appears in that case that each of the stevedoring companies had the right to use the ship's unloading gear and equipment and to go upon such places under the shipowner's control as were reasonably necessary in the performance by the employees of each stevedoring company of the work of discharging the cargo from vessel hold to point of rest on the dock floor within the dock warehouse.

It is clear under the facts of *Cordray* that is was the contractual obligation of the shipowner to move the cargo from the hold of the vessel to a place of rest on the pier along shipside but, additionally, to move the cargo to the dock warehouse. Cordray was on board the ship when injured performing his duty of coordinating the unloading of the cargo from the ship's hold to its place of rest on the dock. He was assisting in the unloading of the ship, which is the type of work traditionally performed by seamen. Clearly he was entitled to the protection afforded seamen. The statement in *Cordray*, "* * * that the duty of providing a seaworthy ship and gear at the time of this accident extended to the appellee, whether or not appellee was on board the ship *or on the dock*," (emphasis added) must be read in the light of the facts of that case. The *Cordray* opinion cannot be construed to extend to protection of the warranty of seaworthiness to any dock longshoreman whose injury results from unseaworthiness of a ship without regard to the type of work in which he is engaged.

Hence, unlike the facts in *Cordray*, the moving of the lumber from the dock to the vessel's loading gear

was not part of the ship's service unless it can be said that the work of libelant was of the type traditionally performed by seamen.

In the instant case, the test of libelant's right to the protection of the warranty of seaworthiness is whether he was engaged in the type of work traditionally done by seamen. In *United Pilots Assn.* v. *Halecki*, 358 U. S. 613, 616-17, the Supreme Court stated:

> "The eventful development of the doctrine of unseaworthiness in this Court is familiar history. Although of dubious ancestry, the doctrine was born with *The Osceola* and emerged full-blown 40 years later in *Mahnich* v. *Southern S. S. Co.* as an absolute and nondelegable duty which the owner of a vessel owes to the members of the crew who man her. The justification for this rigid standard was clearly stated in the Court's opinion in *Mahnich*:
>
> > "He [the seaman] is subject to the rigorous discipline of the sea, and all the conditions of his service constrain him to accept, without critical examination and without protest, working conditions and appliances as commanded by his superior officers.' 321 U.S. 96, at 103.
>
> "With the nature of the duty thus defined, it remained for two other decisions of the Court to amplify its scope. *Seas Shipping Co.* v. *Sieracki* and *Pope & Talbot* v. *Hawn* made clear that the shipowner could not escape liability for unseaworthiness by delegating to others work traditionally done by members of the crew. Whether their calling be labeled 'stevedore,' 'carpenter,' or something else, those who did the 'type of work' traditionally done by seamen, and were thus related to the ship in the same way as seamen 'who had been or who were about to go on a voyage,' were entitled to a seaworthy ship. See 346 U. S., at 413."

In the *Halecki* case, recovery under the doctrine of unseaworthiness was denied upon the ground that the work of the injured workman, who had gone aboard to clean the generators with carbon tetrachloride was in no way the "type of work" traditionally done by the ship's crew, and it was held that to extend liability for unseaworthiness to the decedent would "distort the law of Mahnich, of Hawn and Sieracki beyond recognition."

The evidence of this case relating to the nature of libelant's work is not in dispute. The libelant was driving a tractor on the dock. His job was to push or pull railroad cars loaded with lumber up to a point on the spur track where the lumber could be reached by the ship's loading gear. He did not participate in loading the lumber onto the vessel or in stowing it. He had nothing to do with ship's tackle nor did his work require him to perform any service aboard the ship. His work was performed solely on the dock and in an operation preliminary to, but separate from, the work of loading the lumber onto the vessel. Although libelant's work brought him close enough to the vessel to be injured by the falling boom, liability arises not from the place of injury but from the nature of the work being performed.

Was the nature of libelant's work of the type traditionally performed by seamen? The only affirmative testimony in the record on the subject is uncontradicted expert testimony to the effect that libelant's work was not of the type traditionally performed by seamen. In our view, the District Court's reliance on *Cordray* was misplaced.

The burden of proof was upon libelant to show that

he was entitled to the protection afforded seamen. In our view, he failed to do so. In so holding, we do not purport to lay down a fixed line of demarcation between "seamen's work" and "shoreside work." Our holding is simply that the libelant failed to meet his burden of proving that the nature of the work performed by him was the "type of work" traditionally performed by seamen.

We will now consider respondent's second contention that the finding and conclusion of the District Court with respect to negligence on the part of respondents is without evidentiary support.

The vessel was of German design, newly-built, engaged as a freighter, and appeared clean. The vessel's starboard boom at her No. 1 hatch was fitted with a topping "lift gear" of German design, semi-automatic in operation, and a permanently affixed appurtenance of the vessel. The "lift gear" was safe and in nowise an inherently dangerous appurtenance when functioning properly. The vessel had five hatches, each with at least two "lift gears."

The vessel had been in Vancouver, B.C. where it worked on October 6th and 7th prior to its arrival at Portland. The vessel arrived at Portland on the morning of October 9th. Early that morning, before the stevedores commenced working, the ship's crew used the topping "lift gear" machinery to raise the booms, including the No. 1 starboard boom, from their cradles to a raised position so that they would be ready for the stevedores.

From then until the accident on the following day of

October 10th, the booms remained raised. Later in the morning of October 9th, while the stevedores were changing the position of No. 1 starboard boom, they discovered that the pawls were stuck, and one of the stevedores used a board to pry them into place on the ratchet. This fact was never reported to any of the ship's officers or crew, although known to the stevedores' hatch boss. There is no evidence that any officer or member of the crew was aware of such malfunctioning. The "lift gear" at No. 1 hatch was used throughout the rest of the day of October 9th. The accident occurred on the morning of October 10th, the circumstances of which have been previously detailed.

There is no evidence in the record of any foreign materials in and about the working elements of the ratchets, notches, pawls and the bearing of the pawl axle, nor physical damage of the working parts immediately prior to the accident, and the District Court so found. As to the cause of the malfunctioning, the District Court stated, "The law of physics tells us that it is reasonable to infer that some abstract and necessarily patent binding force or strain among the working parts prevented a normal automatic mechanical action and function (dropping of the pawls by gravity) and thereby destroyed the usefulness and safety of the gear and rendered the same dangerous and unsafe."

The fact that the vessel was found to be unseaworthy because the pawls in the "lift gear" were defective and inadequate, does not establish negligence on the part of the respondents. The duty to furnish a seaworthy ship is absolute and non-delegable. It is a specie of liability without fault. Hence, the burden of proof rested with

libelant to establish, by a preponderance of evidence, that negligence on the part of respondents was a proximate cause of libelant's injuries and damages.

The District Court concluded that respondents were negligent in failing to properly inspect the pawls and ratchet device to determine the defective nature of the same. It was libelant's burden to establish that respondents breached a duty owing to libelant. The District Court did not mention the nature of the duty owing by respondents to libelant, but we assume in light of the Court's finding that the breach consisted of the failure of respondents to properly inspect the pawl and ratchet device, that the duty owing by respondents was to make a reasonable inspection to see that the gear and equipment furnished by them operated properly.

There is no intimation in the written opinion of the District Court that in reaching the conclusion of negligence, the Court relied in any way upon the doctrine of *res ipsa loquitur*, nor does libelant make any such contention on his appeal. Hence, negligence cannot be inferred from the mere happening of the accident, nor does the accident establish a prima facie case of negligence on the part of the respondents. Nothwithstanding proof of the happening of the accident, the full burden of proof of negligence remained on the libelant.

Proof offered by the respondents, which we do not detail in this opinion, is of no help to libelant since all such proof tended to establish that the vessel's gear and equipment were functioning normally and properly when the stevedores took over the cargo loading operations. Libelant argues that the trial Judge was not required to accept such testimony in view of the happen-

ing of the accident and the discovery by the stevedores, shortly after they commenced their cargo loading operations, of the malfunctioning of the pawl and ratchet device. We agree. However, disbelief by the Court of such proof does not establish a breach of respondents' duty to make a reasonable inspection to see that the gear and equipment furnished for the cargo loading was in good condition and operating normally. The burden of proof was upon the libelant to establish negligence and not upon respondents to establish freedom from negligence.

What did libelant establish? He established: (1) That the accident occurred; (2) That it occurred because of the malfunctioning of the pawl and rachet device; and (3) That the stevedores discovered the malfunctioning of the device shortly after cargo loading operations commenced on the day before the accident. From these facts, libelant contends that the District Court properly inferred that a reasonable inspection by respondents would have revealed the cause of the malfunctioning. The vice of that argument is the absence from the record of any testimony establishing, or tending to establish, the standard of conduct which respondents were required to meet in discharge of their duty to make a reasonable inspection to see that the gear and equipment furnished by them operated properly. There is no testimony in the record of what conduct on the part of operators and owners of vessels of the type or similar to the type of the BELGRANO and similarly equipped, was usual or customary or required by good practice or by law or regulation in making inspection of gear and equipment. Is the standard of conduct met

by a visual inspection of the gear and equipment? Does the standard of conduct require an operational test of the gear and equipment of a vessel? Does the standard of conduct require constant inspection? Does the standard of conduct require inspection before and after each use of the gear and equipment? The record leaves us completely in the dark in attempting to find answers to these questions.

On the record in this case, we are constrained to hold that the libelant failed to meet the burden of proof resting upon him of establishing negligence on the part of the respondents.

The District Court also concluded that the respondents were negligent in failing to furnish libelant with a safe place to work. This point is not mentioned in any of the several briefs which have been filed. There is no evidence in the record that the respondents furnished or were in any way obliged to furnish to libelant the place to work where he was working. The District Court's conclusion of negligence on this point is wholly unsupported.

The judgment and decree from which respondents appeal is reversed.

This disposition of the case makes it unnecessary to consider the question of indemnity since the decree of indemnity rests upon the judgment and decree which is reversed by this opinion. The decree of indemnity is likewise reversed.

(Endorsed) Opinion Filed Feb 8, 1962.

Frank H. Schmid, Clerk.

In the United States District Court
For the District of Oregon

Civil No. 10027

GEORGE WEIGEL,

Libelant,

V.

MV BELGRANO, her engines, tackle and gear, and any and all persons claiming any interest therein, and PARTENWEEDEREI, M. S. BELGRANO, Owner and Operator, SEEKONTER LINE, Charterer and or Operator,

Respondents.

RUDOLPH A. OETKER,

Claimant,

V.

BRADY-HAMILTON STEVEDORE COMPANY, *a corporation*,

Third-Party Respondent.

OPINION

East, J

Nature of Cause

This is a libel in personam and in rem with foreign attachment for damages resulting from personal injuries sustained by libelant as a result of the alleged unseaworthiness of the MV Belgrano ("vessel") and the negligence of the respondents.

The respondents impleaded Brady-Hamilton Stevedore Company ("stevedore") as third-party-respondent under Admirality Rule 56 in a cause of imdemnity.

The libelant at the time of the accident involved was a longshoreman employee of stevedore then under contract to bring aboard and stow the vessel with

cargo, including lumber. The question of the claim of respondents for indemnity from stevedore has been segregated and reserved until adjudication of libelant's claim.

The segregated issue of liability to libelant and the damage has been submitted to the Court following a trial by the Court and the filing of brief.

Pertinent Undisputed Facts

On or about October 10, 1958, the vessel was lying adjacent to the dock at Terminal No. 1 on the Willamette River in the Port of Portland, Portland, Oregon, and longshoremen employed by the stevedore were immediately engaged in moving (topping) the starboard boom at No. 1 hatch in order to bring aboard lumber cargo from the dock when the boom and its rigging fell and struck to libelant, who was working on the dock as a fellow longshoreman, causing him personal injuries.

This Court has admiralty and maritime jurisdiction of this cause in rem of the vessel and in personam of the named parties.

Court's Findings of Fact As To Liability

This Court finds that:

Libelant was struck with the falling boom while he was engaged in his duties as dockworking longshoreman and particularly operating a tractor in reverse motion and pulling with a tow line a railroad car, then loaded with some of the lumber cargo, upon a permanently fixed railroad spur line on the dock along shipside. The purpose was to place the lumber-laden railroad car un-

der and within the reach of vessel's gear so as to load the lumber upon the vessel. (Figure 1.)*

The falling boom struck the libelant without any notice or warning to him.

The vessel was of German design, newly-built and engaged as a freighter, and she appeared clean.

The vessel's starboard boom at her No. 1 hatch had been and was at the time of the accident fitted, among other things, with a topping lift winch drum ("lift gear") of German design. This gear was a permanently affixed appurtenance of the vessel and, unlike the common American style of chain and shackle fastening topping gear, was semi-antomatic in operation.[2] (Figure 2.)

The larger wire rope wound on the left portion of the drum on the lift gear and extending upwards between the words "notches" and "pawl" extends on upwards and through a block on the mast, and is made fast near the top of the boom involved. The lift gear is stationed just abaft of the starboard winch at No. 1 hatch.[3] (Figure 3.)

The smaller steel rope wound on the right portion of the drum has been referred to as "topping lift pennant" and "pigtail line" ("pigtail line"), and the unwound portion thereof lies free on the deck when not in use. The free end of the pigtail line is equipped with

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[1] Footnotes set out at pages 41-44.

* All Figures are printed at close of this Opinion, following p. 40, *infra*.

a "hook," a "dog" or a "pawl" ("dog")[4] (Figure 4.) The "nigger head" or "gypsy head" ("gypsy head") on the winch has a hole or cutting through its outside rim.[5] (Figure 5.) To operate the boom lift gear the dog is inserted in the hole in the rim of the gypsy head.[6] (Figure 6.) This pigtail line dog with the cutting in the rim of the gypsy head is also of German concept and design and, when the dog is properly inserted and locked by a twist in the gypsy head opening,[7] (Figure 7.) the pigtail line is made fast to the gypsy head and cannot be separated by direct pull of the winch unless there is a failure of the metals. When the lift gear is operating normally, the strain of the winch causes an unwinding of the pigtail line and causes a reverse winding of the boom topping wire rope upon the drum and a lifting of the boom. Slack upon the pigtail line will cause an unwinding of the topping wire rope by the weight of the boom, a lowering thereof, and a winding of the pigtail line upon the drum. The drum of the lift gear has as an integral part thereof, at each end, a permanently fixed circular ratchet or pawl rim or wheel made of cast metal provided with a series of cammed ratchets on which permanently attached but free rising and falling pawls ride and rise and drop into the intervening notches by gravity. These two pawls are rigidly connected together with an iron bar and operate on a single axle. When one pawl is up so is the other, and vice versa. When the lift gear in the boom-lifting operation functions correctly according to intent and design, the pawls freely ride and rise upon the cammed ratchets and drop automatically by gravity

into the notches, thus forming a locking device to prevent the drum from turning back under the weight of the boom following an intentional slack or an unexpected failure of the pigtail line. When the gear is used to lower the boom, it is necessary for a longshoreman to manually hold or otherwise prevent the pawls from falling by gravity into the notches. The action of a longshoreman in lowering or letting the pawls fall into the notches will lock the drum and prevent the continued lowering of the boom or a falling of the boom upon a sudden parting or failure of the pigtail line.

The intent and design of the lift gear is an improvement upon the mentioned American gear and is a safe and is in nowise an inherently dangeorus appurtenance when functioning properly. There would be a malfunction of the gear according to design and intent if the pawls did not freely ride and rise and drop by gravity or in anywise fail to drop freely by gravity when released from a manual holding.

Immediately prior to the commencement of the operation leading up to the accident, the ratchet notches and the pawls were in a locked position and the lift gear was steady under the weight of the boom. The work of bringing aboard the lumber at No. 1 hatch required a topping of the boom in order to place the same in a working position, and the winch driver called to a ship longshoreman and asked for "a hand" in attaching the free end of the pigtail line to the gypsy head. The winch operator did not see this operation,

and the longshoreman involved can give no satisfactory account of what he did in the way of fixing the free end of the pigtail line to the gypsy head. In any event, it was somehow attached, but evidently not properly. The winch driver took up the slack in the pigtail line, put strain thereon, and commenced the lifting of the boom. The winch driver did not hear the "clanking" of the pawls (dropping of the pawls in the notches in the ratchet rims). After raising the boom approximately three-four feet, the driver stopped the winch, braked it, and started astern to see what was wrong. Under the weight of the boom, the pigtail line started to slip on the gypsy head and the boom lift wire rope on the drum of the lift gear started to unwind. The boom in its fall gathered momentum, and the flailing free end of the pigtail line prevented the winch driver from manually putting stress upon the same. The boom, uncontrolled, fell to the starboard side of the vessel across the dock and struck the libelant. From the commencement of the raising of the boom, the unwinding of the drum, and throughout the fall of the boom, the pawls had failed to fall into the notches by gravity or otherwise.[8]

On the day before the accident, while in the process of topping the boom involved through the use of the lift gear, the pawls had locked in an upright position and failed to properly function by falling under gravity into the locking position, and a longshoreman had used a piece of dunnage to strike and knock the pawls into position.

Court's Conclusions of Law As To Unseaworthiness and Negligence

That there was a malfunction in the intent and design and of the lift gear during the operation of the lifting of the boom in that the pawls failed to freely ride the cammed ratchets and drop freely into the notches is self-evident. Otherwise, there would have been a maximum drop of the boom to the extent of some seven inches or a destruction of the locking device of notch and pawl, which there was not. Therefore, the Court concludes:

(1) That the said vessel was unseaworthy in that:

"3. That (pawls) on the ratchet in the topping lift gear was (were) defective and inadequate in that it (they) did not drop into each cog as the boom was hoisted so as to prevent the boom from falling."[9]

(2) That the respondents and the claimant were negligent in:

"4. Failing to properly inspect said vessel and particularly the said ratchet and (pawl) device to said hatch to determine the defective nature of same * * * " (Reasonable inspection would have disclosed the malfunctioning of the pawls, known to the longshoreman the day before.)

"4. Failing to provide (the) libelant with a safe place to work * * * "

(3) That said unseaworthiness of the vessel and concurring negligence of the respondents and claimant were the proximate cause of the falling of the boom[10] and libelant's resulting injuries.

Courts' Conclusions As To Liability To Libelant

The Court concludes that the libelant at the time of the accident was engaged in performing a part of the ship's service as a longshoreman in the process of loading and stowing her cargo. Particularly he was engaged in moving or bringing this lumber cargo from its last place of rest following handling by others to a position on the dock shipside in order to be reached by the ship's gear and tackle. In the language of Circuit Judge Hamlin of the Ninth Circuit:

> "The appellee's (libelant's) work was the work of a longshoreman and he was entitled to seaworthy gear while he was performing his services." Pope & Talbot, Inc v. Cordray, 258 F.2d 214 (CA 9 1958).

And, this "duty of providing a seaworthy ship and gear at the time of this accident extended to the (libelant), whether or not (libelant) was on board the ship or on the dock."

That in the Cordray case the appellee was a foreman of dock longshoremen and he had the duty of coordinating the activities of the dock-working longshoremen in the unloading of the vessel. Surely there can be no distinction between a (1) (Cordray) dock-working longshoreman moving cargo from the reach of the ship's tackle "to its first place of rest" on shore (258 F.2d 214, 215) during the discharge of cargo; and (2) (instant case) a dock-working longshoreman bringing cargo from its last place of rest on shore within the reach of the ship's tackle during the loading of cargo. Both dock-working longshoremen stand in a

like degree of relationship to the fellow ship-working longshoremen. Reason dictates they respectively are engaged in the work of the service and business of the vessel, which is the ultimate test.

Therefore, the vessel is liable to the libelant for her unseaworthiness, which concurred with the negligence of the respondents and claimant in causing libelant's injuries.

Court's Findings of Fact and Conclusions of Law As To Libelant's Injuries and Damages

The Court finds that:

The libelant at the time of the accident was an able-bodied man of 58 years, physically able to perform the regular and normal duties required of him in his position of a tractor-driving dock-working longshoreman.

As a result of being struck by the boom, libelant suffered nervous shock, physical and mental pain and suffering, a brain concussion and a skull fracture, causing complete unconsciousness of several hours' duration, broken hip, a memory loss of temporary duration, severe lacerations and contusions, a severe tearing, twisting and wrenching of the muscles, tendons, ligaments and soft tissues of his limbs and body, and soft tissues of his head. As a result of said injuries the libelant was temporarily totally disable and impaired from performing any work or labor from the date of the accident until the month of June-July, 1959, at which time his medical doctor advised him to return

to work, or for a reasonably ascertained period of nine calendar months. Thereafter, until the date of trial on February 23, 1960, or for a period reasonably determinable as seven and one-third calendar months, libelant was partially totally disabled from performing any work for gain. Some of said injuries have caused a permanent partial loss of the body functions in the region of the neck and shoulders and have permanently but partially impaired libelant's ability to work in his prior occupation. The libelant has no education or occupational training which would enable him to engage in work other than that in the allied field of a longshoreman.

The libelant's wages from and after the date of the accident until the time of trial could have been reasonably expected to average the sum of $573.39 per calendar month. The libelant has, since the date of the accident until the date of trial, on account of his injuries, incurred reasonable and necessary doctor, hospital and medical expenses in the amount of $1,032.55.

Therefore, the libelant is entitled to recover as lost wages during this period of total and partial disability to work, the sum of $7,675.00, and is further entitled to recover the sum of $1,032.55 medical expenses, and as general damages the sum of $32,500.00.

Proctor for the libelant is requested to submit appropriate form of decree and judgment, adopting as a part thereof and as the Court's findings of fact and conclusions of law the foregoing.

Dated April 14, 1960.

FIGURE 1

FIGURE 2

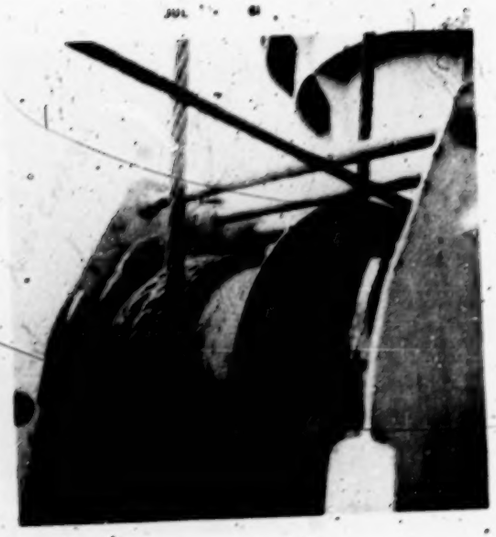

FIGURE 3

FIGURE 4

FIGURE 5

FIGURE 6

FIGURE 7

Footnotes

1. Respondents' Exhibit 54 (16).

2. Attached to respondents' interrogatories to ship's carpenter, Thomas Thomasen, on file herein.

3. Respondents' Exhibit 54 (1).

4. Respondents' Exhibit 67(a).

5. Third-Party's Exhibit 100(c).

6. Respondents' Exhibit 54(6).

7. Respondents' Exhibit 54(8).

8. There is no evidence in the record of any foreign materials in and about the working elements of the ratchets, notches, pawls and the bearing of the pawl, axle, nor physical damage of the working parts immediately prior to the accident. The law of physics tells us that it is reasonable to infer that some abstract and necessarily patent binding force or strain among the working parts prevented a normal automatic action and function (dropping of the pawls by gravity) and thereby destroyed the usefulness and safety of the gear and rendered the same dangerous and unsafe.

9. See Hagans vs. Farrell Lines, 237 F.2d 477 (CA 3, 1956), where the malfunction of an automatic brake (otherwise a safe device) on a winch failed to hold a load and permitted a "drift" and some five or more feet of cable to run off the winch drum, causing an injury to a ship-working longshoreman. The winch was held to be defective and rendered the vessel unseaworthy.

See also Crumady v. The J. H. Fisser, 358 U.S.

423 (Mr. Justice Douglas, 1959), pp. 425, 426:

"The safe working load of the boom and cargo runner and topping-lift handling the load at the time of the accident was three tons each. This equipment, which was part of the unloading and loading gear of the vessel, was in good condition. The winch, which served the boom, had a 'cut off' device or circuit breaker. (An automatic device to prohibit reverse action.) It was set to shut off the current on the application of a load of about six tons, which was twice the safe working load of the unloading gear. The circuit breaker operated perfectly, cutting off current at the point of stress for which it was set. It had been set to operate at a load slightly more than twice the safe working load of the unloading gear (malfeasance) by employees of the ship before the winch was turned over to petitioner's fellow employees for operation.".

"The work of loading and unloading is historically 'the work of the ship's service.' * * *

"This protection against unseaworthiness imposes a duty which the owner of the vessel cannot delegate. * * * Unseaworthiness extends not only to the vessel but to the crew * * * and to appliances that are appurtenant to the ship. * * * And as to appliances the duty of the shipowner does not end with supplying them; he must keep them in order. * * * The shipowner is not relieved of these responsibilities by turning control of the loading or unloading of the ship over to a stevedoring company. * * * We need not go so far to sustain the District Court here. For there is ample evidence to support the finding that these stevedores did no more than bring into play the unseaworthy condition of the vessel. The winch—an appurtenance of the vessel—was not inherently defective as was the rope in the Mahnich case. But it was adjusted (neglected and permitted to become inoperable—non-feasance) by those acting for the vessel owner in a way that made it unsafe and dangeorus for the work at hand. While the

rigging would take only three tons of stress, the cut-off of the winch—its safety device—was set at twice that limit. This was rigging that went with the vessel and was safe for use within known limits. Yet those limits were disregarded by the vessel owner when the winch was adjusted. The case is no different in principle from loading or unloading cargo with cable or rope lacking the test strength for the weight of the freight to be moved. In that case the cable or rope, in this case the winch, makes the vessel pro tanto unseaworthy." 358 U.S., at pp. 427-8.

10. Assuming the fastening devices of the free end of the pigtail and in the gypsyhead were defective or that they were improperly united by the longshoreman, such condition was not the cause of the falling of the boom. It is true that if these locking devices had functioned properly the pigtail line could not have become free and slipped upon the gypsy head. It appears from the evidence that there was sufficient friction by the winding of the pigtail line upon the gypsy head to raise the boom some three or more feet and it was only when the winch was braked that the weight of the boom overcame the friction of the pigtail line upon the gypsy head. Had the notch and pawl devices on the lifting gear functioned properly, the winch would have been stopped and braked, more friction would have been created by the winding of the pigtail line upon the gypsy head, and there could not have been the overcoming stress of the weight of the boom upon the pigtail line. A proper functioning of the locking device on the gypsy head would in all probability have stopped or prevented the fall; however, any improper function-

ing of the locking device was not the cause of stopping the operation of the winch and the following sequence of events directly resulting in the loss.

Respondents can build no avenue of escape from the language of Titus v. The SS Santorini, 152 F.Supp. 63, affirmed 258 F.2d 352. There a preventer wire and guy rope for a starboard boom parted under the weight of a sling load as it came up and aboard. Following the trial and after a study of "the complete record and all of the evidence presented" (152 F.Supp. 64), my able colleague from Idaho, sitting on this bench, could find no causation for the parting of the otherwise ample wire and rope which was attributable to and rendered the vessel unseaworthy.

> "[3, 4] As has been stated the burden rests on the libelant to prove the allegations of unseaworthiness, and where there is nothing shown to the contrary, it may be presumed that was the case merely because the accident happened while the gear was being used in the usual and customary manner. However, here the presumption is overcome with evidence to the contrary, making it necessary that there be some further affirmative showing on the part of the libelant that the unseaworthiness alleged existed. There is no such showing here." 153 F. Supp. 65.

The trial court

> " * * * was expressing an abiding belief that appellant had not proved what caused the breaking other than that it had been shown that 'the force exerted on it was greater than its breaking strength.'" 258 F.2d. p. 354.

> "The trial court on the facts here had the privilege of being honestly puzzled as to causation.

Without a conviction that the accident happened because of a definite condition for which the appellee was to blame, it had no duty to find for the injured stevedore." 258 F.2d, p. 356.

Titus might have saved the vessel had some negligent act of the longshoreman in handling the locking devices of the pigtail line dog and gypsy head been the proximate cause of the failure of the gear.

"This court is not convinced that the instantaneous acts of a fellow longshoreman rendering the equipment unseaworthy and injury to the longshoremen are chargeable to ship as unseaworthiness." 258 F.2d, p. 354.

Referring to Grillea v. United States, 232 F.2d, 919, 922.

11. "'* * * Historically the work of loading and unloading is the work of the ship's service, performed until recent times by members of the crew. [328 U. S. at page 96, 66 S.Ct. at page 878.] * * * That the owner seeks to have it done with the advantages of more modern divisions of labor, does not minimize the worker's hazard and should not nullify his protection. [328 U.S. at page 96, 66 S.Ct. at page 878.] * * *

"'Accordingly we think * * * that the liability arises as an incident, not merely of the seamen's contract, but of performing a ship's service with the owner's consent.' 328 U.S. at page 97, 66 S.Ct. at page 878."

Pope & Talbot, Inc. v. Cordray, 258 F.2d 214, at p. 216.

[Endorsed]: Filed April 14, 1960.

[Title of District Court and Cause.]

OPINION

East, J.

Libelant was awarded herein a decree of damages against the Respondents and Claimant (Petitioners) in compensation for personal injuries received while working as a dock-working longshoreman employee of Brady - Hamilton Stevedore Company (Stevedore), third-party respondent herein, then engaged in loading and stowing the M V Belgrano (Vessel) with lumber cargo and in all respects performing the stevedoring work on dock and on board the Vessel pursuant to a stevedore contract with the representatives of Vessel.

With the view of placing ultimate liability, if any, at the doorstep of Stevedore, the Petitioners interpleaded the Stevedore, petitioning for indemnity and reparations for all loss that they might sustain by reason of Libelant's claims. The Petitioners contend, inter alia:

A.

"2. As contracting stevedore, impleaded respondent owed the implied contractual obligation to perform the stevedoring work in a safe and proper manner.

"6. If (Petitioners) herein should be held liable in this case to libelant, then (Petitioners) have a right to recover over against impleaded (Stevedore) for full and complete indemnity because of said (Stevedore's failure to perform its stevedore contract in a safe and proper manner * * *."

B.

"4. The gear and machinery of the vessel were in good and seaworthy condition, and the accident

was caused by negligence of (Stevedore) in failing to properly use said gear and machinery, and particularly in failing to properly secure the topping lift pennant (pigtail line) to the winch gypsy head.

"5. If the gear and machinery of the vessel were unseaworthy at the time of the accident, which (Petitioners) deny, then said unseaworthiness was either created by the negligence of (Stevedore), or was 'brought into play' by (Stevedore's) improper use of said gear and machinery or by (Stevedore's) negligence in using said gear and machinery after knowledge of its condition."

C.

"6. * * * and (Petitioners) are entitled to recover from and against (Stevedore) for all damages that may be awarded herein and for costs and expenses, including such reasonable attorney's fees as may be incurred by (Petitioners) in defending against the libel."

The issue of indemnity was segregated and reserved awaiting adjudication of Libelant's claims against Petitioners.

In connection with the segregated issue of Libelant's claim, the Court concluded[1] that the Vessel was unseaworthy in that her topping "lift gear" for the starboard boom at No. 1 hatch malfunctioned and permitted the boom to fall upon the Libelant, and more particularly:

"(1) * * *

"3. That (pawls) on the ratchet in the topping lift gear was (were) defective and inadequate in that it (they) did not drop into each cog as the boom was hoisted so as to prevent the boom from falling."

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[1] Footnotes set out at pages 54-58.

"(2) That (Petitioners) were negligent in:

"4. Failing to properly inspect said vessel and particularly the said ratchet and (pawl) device to said hatch to determine the defective nature of same * * * (Reasonable inspection would have disclosed the malfunctioning of the pawls, known to the longshoreman the day before.)

"5. Failing to provide (the) libelant) with a safe place to work * * *"

The segregated and reserved issue of Petitioners' claim for indemnity from Stevedore is now ripe for packaging.

As will be later pointed out, the circle of judicial legislation is now complete except for trimming the loose ends of the knot and making it shipshape. The longshoreman who was deprived of a cause of action to recover damages for personal injuries caused through the negligent act of his employing stevedore by the Longshoremen's and Harbor Workers' Compensation Act of 1927, 33 U.S.C.A. §901, et seq., has now for all practical purposes regained this comfort.

The first stage of this metamorphosis commenced by clothing the longshoreman (seaman pro hac vice) with the mantle of protection against unseaworthiness of the Vessel in whose service he worked, all to the despair of the shipowner.[2]

The second stage was the bringing of the employer-stevedore to accountability for causing the unseaworthy condition through the now out-of-favor theory of active negligence of stevedore versus passive negligence of the shipowner.[3]

Then the third stage, where a stevedore is now ultimately liable to make reparations for loss resulting from its breach of a pre-existing continuing contractual duty, namely, the failure while performing its stevedore contract to meet its contractual warranty to handle the cargo and use the ship's gear incidental thereto with reasonable safety in light of expertise in the field. This is so even though the ship's gear may have been malfunctioning and therefore unseaworthy when taken over by a stevedore. Smith v. Jugosalvenska Linijska Plovidea, 278 F.2d 176, at p. 180 (4 Cir., April, 1960), citing Crumady v. Joachim Hendrik Fisser, 358 U.S. 423 (1959).

Will the cycle be eventually completed with a fourth-stage judicial sanction of an action by the injured longshoreman directly against his defaulting employer-stevedore, on the premise that the longshoreman was engaged in ship's service and was a person who in the reasonable contemplation of the parties to the warranty might be expected to be injured through failures caused by the Stevedore's breach of warranty to handle cargo and use ship's gear incidental thereto with reasonable safety?[4]

In view of the ultimate holding to follow, it is not necessary to deal with Petitioner's contentions (B, above) of a breach of Stevedore's warranty by reason of negligent use of the Vessel's gear (pigtail line dog and gypsy head locking devices) by a longshoreman-employee of Stevedore, which in turn "put into play" the defective and unseaworthy "lift gear" was under the teachings of Crumady.

In passing, we might say there is strong suspicion of such negligence,[5] but suspicion in and of itself is not as yet circumstantial evidence of negligence.

The tenable basis of Petitioners' claim for indemnification is simply the alleged breach by Stevedore of the contractual implied in-fact warranty in its stevedoring contract to perform its contract with reasonable safety.

For the duties of the Stevedore to the Petitioners in the performance of its stevedoring contract, we find that:

> "[I]n Weyerhaeuser S.S. Co. v. Nacirema Operating Co., 1958, 355 U.S. 563, 567, 78 S.Ct. 438, 441, 2 L.Ed. 2d 491, the Supreme Court, after stating that the stevedore's contractual obligation to perform his work with reasonable safety related not only to handling of cargo, but also to the use of equipment incidental thereto, said: '* * * If in that regard respondent rendered a substandard performance which led to foreseeable liability of petitioner, the latter was entitled to indemnity absent conduct on its part sufficient to preclude recovery. * * *' While a standard to be applied to 'conduct * * * sufficient to preclude recovery' has not been created, it has been decided that the mere furnishing of defective equipment by the ship to the stevedore does not bar recovery over under the contract. Crumady v. The Joachim Hendrik Fisser, supra; Calmar S.S. Corp. v. Nacirema Operating Co., 4 Cir., 1959, 266 F.2d 79; American Export Lines, Inc. v. Revel, 4 Cir., 1959, 266 F.2d 82." [Emphasis supplied.]
>
> * * *
>
> "Although the contractual obligation of Stevedores in this case arises through implication by the conduct of the parties, we are of the opinion that such

contract was binding. Restatement, Contracts § 5 (1932). As is stated in Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 1956, 350 U.S. 124, 133, 76 S.Ct. 232, 237, 100 L.Ed. 133:

> "* * * This obligation is not a quasi-contractual obligation implied in law or arising out of a non-contractual relationship. It is of the essence of petitioner's stevedoring contract. It is petitioner's warranty of workmanlike service that is comparable to a manufacturer's warranty of the soundness of its manufactured products. * * *"
>
> * * *
>
> "* * * The shipowner's action is not changed from one for a breach of contract to one for a tort simply because recovery may turn upon the standard of the performance of petitioner's stevedoring service.'" Smith v. Jugosalvenska Linijska Plovidea, supra.

The full acceptance by the Supreme Court of the United States in Crumady of the rationale of the foregoing contractual-duty theory rather than the active versus passive negligence theory of Stevedore's liability for indemnity was anticipated and forecast by District Judge William C. Mathes in Hugev v. Dampskisaktieselskabet International, 170 F.Supp. 601 (SD Cal. 1959), later adopted as the settled rule for the Ninth Circuit in Metropolitan Steved re Company v. Dampskisaktieselskabet International, 274 F2d 875 (Jan., 1960), (affirmal of Hugev.)

The correlative contractual duty of Petitioners (shipowner) under the stevedoring contract is clearly set forth in Hugev in the following language:

> "(1) * * *
>
> "(2) to give the stevedoring contractor reason-

> able warning of the existence of any latent or hidden danger which has not been remedied and is not usually encountered or reasonably to be expected by an expert and experienced stevedoring company in the performance of the stevedoring work aboard the ship, if the shipowner actually knows or, in the exercise of ordinary care under the circumstances, should know of the existence of such danger, and the danger is one which the shipowner should reasonably expect a stevedoring contractor to encounter in the performance of the stevedoring contract." [Citing numerous cases, pp. 610-11.]

It is now settled that to have merely turned over and given to the use of Stevedore the malfunctioning and unseaworthy "lift gear" was not in and of itself a breach of Petitioners' contractual duty. Crur ady, supra. This allowance, or maritime-license, of conduct between shipowner and stevedore is predicated upon these policy considerations discussed by Hugev:

> "(a) the possibility, or even probability, of unseaworthiness after long voyages, and
>
> (b) the expertise of the stevedoring company and its employees." Metropolitan p. 876.

We learn from Hugev that there must be something more on the part of the shipowner, something in the way of a want of reasonable care, towards Stevedore.

This Court has found that in failing to discover by reasonable inspection the unseaworthy "lift gear," the Petitioners were negligent towards Libelant and that such negligence was one of the concurrent proximate causes of Libelant's injuries.[6] Assuming that such negligence of the Petitioners towards Libelant would also constitute a breach of their implied in-fact duty in

favor of Stevedore to use reasonable care in discovering latent defects in the "lift gear," nevertheless such neglect can be of no avail or solace to the Stevedore; the reason being that we also find that the Stevedore, through a longshoreman and a hatch boss, had actual knowledge of the malfunctioning and unseaworthy condition of the "lift gear" prior to the accident.[7] This actual knowledge by Stevedore, even though independently obtained, intervenes and washes out any nonfeasance of Petitioners in performing their implied in-fact contractual duty to Stevedore. The Petitioners owed no duty to restrain the Stevedore from acting or using gear in the face of disregard of a known defect or danger. This is exactly what the Stevedore did when it used with full knowledge of its condition the malfunctioning lift gear in connection with and incidental to the handling of the ship's cargo pursuant to its contract. The inevitable failure of the gear and resulting injuries to persons in ship's service was most probable and reasonably foreseeable by an expert stevedore. This foregoing conduct of Stevedore does not carry to and falls short of meeting the requirement that the Stevedore use gear necessary and incidental to the working of the ship's cargo with reasonable safety as tested by stevedore expertise.

From the facts found in the opinion upon the segregated issue of Petitioners' liability to Libelant and this opinion, this Court concludes that Petitioners were not short in performing their obligations to Stevedore under the stevedoring contract and that Stevedore, while engaged in its stevedoring contract to load and stow cargo,

breached its implied in-fact contractual obligation to use the ship's gear, in preparation and incidental to the handling of cargo, with stevedore expertise and with reasonable safety to persons engaged in ship's service, and that such breach by the Stevedore was a proximate cause of the falling of the boom and resulting injuries to Libelant. This Court further concludes that the Petitioners are entitled to reparation from the Stevedore to the full extent of its loss, expense and damage on account of Libelant's judgment aforesaid. Hugev, at p. 612.

In the event that the parties can stipulate as to the aggregate amount of Petitioners' reparations, proctor for the Petitioners may submit proposed decree and judgment order adopting the mentioned opinions of this Court as findings of fact and conclusions of law of this Court (FRCP 52 (a)) upon which to predicate a judgment in favor of Petitioners and against Stevedore for the amount of stipulated reparations.

In the event of a failure of such stipulation, the Court will, upon application of Petitioners, hear and determine the Petitioners' contentions as to amounts of reparations.

Dated August 3, 1960.

Footnotes

1. Court's opinion upon the segregated issue of Petitioners' liability to Libelant, entered April 14, 1960. A.M.C., Fed. Supp.

2. "There would seem to be no aspect of judicial legislation in the mere permission of suits by long-

shoremen and harbor workers against shipowners or other third parties. Such suits are contemplated by the Longshoremen's Act. 33 U.S.C. 933.

"However, criticism can validly be directed at the extension of the doctrine of unseaworthiness to longshoremen whose employers are wholly at fault, permitting recovery from the vessel. Seas Shipping Co., Inc. v. Sieracki, 328 U.S. 80 (1946)." Excerpt from an address by Edward C. Holden, Jr., Esq., of New York City, to the Federal Bar Association Convention, Washington, D. C., September 20, 1957.

3. "The manifest injustice to shipowners leads to the permission of recovery by the innocent shipowner from the employer of longshoremen, making recovery from the employer by the employee by indirection, possible in some instance in plain contravention of the Longshoremen's Act, as was decreed in the Palazzolo case.

"Ryan Co. v. Pan-Atlantic Corp., 350 U.S. 124 (1956). Black, J., dissenting, at 141, stated: 'Liability is thus imposed because of the negligence of the employer's other employees. This the act forbids. Whether called "common law indemnity," "contribution," "subrogation," or any other name, the result is precisely the same. The employer has to pay more "on account of" an injury to his employee than Congress said he should.'

"Accordingly it must be conceded that the letter and spirit of the Federal Longshoremen's and Harbor Workers' Compensation Act receives scant attention from the courts." Excerpt from Mr. Holden's address.

4. It has been said that a stevedore's warranty of workmanlike service is comparable to a manufacturer's warranty of the fitness of its manufactured products. Ryan Stevedoring Co. v. Pan-Atlantic SS Co., 350

U.S. 124. Generally, see Prosser on Torts (2 Ed. 1955) § 84.

In DiVello v. Gardner Machine Co., 102 NE2d 289 (Ohio 1951), a manufacturer's warranty for the fitness of its product (grinding wheel which exploded) was extended to the injured employee of the purchaser of the product, although not in privity of contract of purchase, but being a "workman of the vendee who was injured in its ordinary use because of latent defects." For a like holding, see Peterson v. Lamb Rubber Co., 343 P.2d 261 (Cal. Ap. 1959).

Also see Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69, 99-100 (Sup.Ct. NJ, 5-9-60), wherein the Court says:

> "In the present matter, the basic contractual relationship is between Claus Henningsen, Chrysler, and Bloomfield Motors, Inc. The precise issue presented is whether Mrs. Henningsen, who is not a party to their respective warranties [driver of defective car] may claim under them. In our judgment, the principles of those cases and the supporting texts are just as proximately applicable to her situation. We are convinced that the cause of justice in this area of the law can be served only by recognizing that she is such a person who, in the reasonable contemplation of the parties to the warranty might be expected to become a user of the automobile. Accordingly, her lack of privity does not stand in the way of prosecution of the injury suit against the defendant Chrysler.
>
> "By a parity of reasoning, it is our opinion that an implied warranty of merchantability chargeable to either an automobile manufacturer or a dealer extends to the purchaser of the car, members of his family, and to other persons occupying or using

it with his consent. It would be wholly opposed to reality to say that use by such persons is not within the anticipation of parties to such a warranty of reasonable suitability of an automobile for ordinary highway operation. Those persons must be considered within the distributive chain.

"Harper and James suggest that this remedy ought to run to members of the public, bystanders, for example who are in the path of harm from a defective automobile. 2 Harper & James, The Law of Torts, 1956 Ed., p. 1572."

Compare Gottsdanker, a minor, v. Cutter Laboratories, et al.; Phipps, a minor, v. Cutter Laboratories (consolidated cases Nos. 18413 and 18414, District Court of Appeals, First Appellate District, Division Two, State of California), entered July 12, 1960, wherein it was held that the defendant manufacturer of Salk vaccine which "contained live virus of poliomyelitis" were held liable for causing the resulting diseases in each of the plaintiffs when inoculated by physicians with the vaccine secured through independent suppliers for the doctors.

Is it not logical to further suggest that since the Stevedore's warranty to perform his work with reasonable safety runs to the protection of the Vessel, that it also and necessarily runs to the protection of persons working in the ordinary course in her service as "seamen pro hac vice"?

5. "The winch driver called to a ship longshoreman and asked for 'a hand' in attaching the free end of the pigtail line to the gypsy head. The winch operator did not see this operation, and the longshoreman involved can give no satisfactory account of what he did in the way of fixing the free end

of the pigtail line to the gypsy head. In any event, it was somehow attached, but evidently not properly." Excerpt from prior opinion.

6. "We held in Calmar v. Nacirema, decided today, 1959 A.M.C. 1083, F.(2d) , that a finding of negligence in supplying such equipment is not determinative of the shipowner's right to indemnity. His action is in contract and recovery depends upon whether his conduct has been such as to bar enforcement of the contract, and not whether he has been found negligent in regard to the longshoremen. Weyerhaeuser S.S. Co. vs. Nacirema Co., 355 U.S. 563, 1958 A.M.C. 501." Cited in American Export Lines v. Revel, 266 F.2d 82 (4 Cir. 1959); 1959 A.M.C. 1073, 1081.

7. "On the day before the accident, while in the process of topping the boom involved through the use of the lift gear, the pawls had locked in an upright position and failed to properly function by falling under gravity into a locking position, and a longshoreman had used a piece of dunnage to strike and knock the pawls into position." Excerpt from prior opinion.

[Endorsed]: Filed August 3, 1960.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

Supreme Court, U.S.
FILED
AUG 31 19
JOHN F. DAVIS, CLERK

In the Supreme Court

of the United States

No. 301, OCTOBER TERM, 1961

GEORGE WEIGEL,

Petitioner,

v.

PARTENWEEDEREI, MS BELGRANO and RUDOLPH A. OETKER,

Respondents,

BRIEF OF RESPONDENTS PARTENWEEDEREI ET AL IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 8-62

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REASONS WHY PETITION SHOULD NOT BE GRANTED

This case is of obvious importance to the individual parties involved. But it is not of great importance to any large class of workers.

The warranty of seaworthiness imposing liability without fault, historically owed by a shipowner to its seamen employees, has been extended to those workers who, under modern conditions, are not crew members,

but nevertheless perform the work on and about ships which was traditionally done by the seamen themselves. The warranty does *not* extend to every land worker who may come near a ship, regardless of the nature of his work.

This Court, in *United New York and N. J. Pilots Assn.* v. *Halecki*, 358 U.S. 613, 3 L. ed. 2d 541 (1959), defined the class of workers to whom the warranty extends. Regardless of the label on the job, "those who did the 'type of work' traditionally done by seamen, and were thus related to the ship in the same way as seamen 'who had been or who were about to go on a voyage,' were entitled to a seaworthy ship."

The Court of Appeals applied that test (Opinion Ct. Appeals, Appx. Pet. for Cert., p. 24-25). No question of law is involved here. The case merely involves the narrow question whether the particular job being performed by petitioner met this test.

1. The Case is not Important to any Large Class of Workers.

As shown above, this case involves only the narrow question whether the particular job being performed by petitioner was "the type of work traditionally done by seamen," so as to entitle him to the warranty of seaworthiness.

The guiding principle of law has already been established. The great majority of workers fall clearly into one class or another. Clearly, the longshoremen who actually load and stow cargo are performing seamen's

work.[1] Just as clearly, the taxi driver who brings a passenger to the pier, or the truck driver who brings cargo to the dock, are not performing seamen's work. Only in a small number of cases will there be a serious issue whether the worker's job is of the type to entitle him to the warranty.

This Court, having established the principles of law, can hardly be expected to review the factual details of every category of waterfront job to determine whether that particular job meets the test of "traditional work of the crew."

2. Petitioner's Fears of Confusion and Administrative Difficulties are Unfounded.

Petitioner asserts that the Court of Appeals decision will give rise to battles of experts, confusion, and administrative difficulties in determining who is entitled to the warranty. Such fears are wholly unfounded.

All that the Court of Appeals held was that petitioner had not sustained his burden of proving that he was doing work such as to entitle him to the warranty.

The pleadings raised this issue (Pre-Trial Order VI (2), R. 8). Thus, the normal burden of proof was upon petitioner as libelant. There was no dispute as to the nature of his work. It is described by the Court of Appeals:

"The libelant was driving a tractor on the dock.

[1] "Historically the work of loading and unloading is the work of the ship's service, performed until recent times by members of the crew." *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85 at p. 96, 90 L. ed. 1099 at p. 1107.

> His job was to push or pull railroad cars loaded with lumber up to a point on the spur track where the lumber could be reached by the ship's loading gear. He did not participate in loading the lumber onto the vessel or in stowing it. He had nothing to do with ship's tackle nor did his work require him to perform any service aboard the ship. His work was performed solely on the dock and in an operation preliminary to, but separate from, the work of loading the lumber onto the vessel. Although libelant's work brought him close enough to the vessel to be injured by the falling boom, liability arises not from the place of injury but from the nature of the work being performed.
>
> "Was the nature of libelant's work of the type traditionally performed by seamen? The only affirmative testimony in the record on the subject is uncontradicted expert testimony to the effect that libelant's work was not of the type traditionally performed by seamen." (Op. Ct. Appeals, Appx. Pet. for Cert., p. 25).

The only evidence in the case was that this type of work has traditionally been done by teamsters, not seamen. Before the tractor, horses or mules were used to bring lumber cargo near enough to the ship to be reached by its gear. Seamen were never employed as drivers of teams of horses or mules (R. 473, 487-488, 495).

In the vast majority of cases, this issue is not raised. The plaintiff's work either falls clearly within, or clearly without, the test of "work traditionally done by the crew." In those few cases where this issue is involved, it is no more difficult to resolve than many other factual issues.

3. Court of Appeals Decision is not in Conflict with any Decision of this Court, or Courts of Appeal.

As shown above, the Court of Appeals decision follows and correctly applies the principles established by this Court in *United New York and N. J. Pilots Assn.* v. *Halecki*, 358 U.S. 613, 3 L. ed. 2d 541.

The Court of Appeals decision in no way conflicts with the various Court of Appeals cases holding that a longshoreman engaged in loading and unloading the vessel, but working on the dock, is entitled to the warranty. Admittedly, it is not the *place* where the man is working that controls:—it is the *type of work* he was doing. Even members of the crew perform some tasks on the dock, such as handling vessel's lines, rigging gangway, painting ship's side, and of course they are entitled to the warranty. So are longshoremen who are engaged in loading or unloading the cargo, as for example when they are on the dock fastening the cargo gear to the cargo. Conversely, the warranty does not apply to work aboard the vessel if the type of work was not the traditional work of seamen. That is the *Halecki* case.

The Court of Appeals decision is not based upon petitioner being on the dock. The Opinion expressly states that "liability arises not from the place of injury but from the nature of the work being performed." (Op. Ct. Appeals, Appx. Pet. for Cert., p. 25).

Obviously, petitioner's designation as a "longshoreman" is not significant. It is not the label, but the type of work that controls. *United New York and N. J. Pilots* v. *Halecki*.

4. The Asserted Conflict with Salem v. U. S. Lines Does not Exist.

On the issue of negligence, petitioner asserts that the Court of Appeals decision conflicts with this Court's decision in *Salem* v. *U. S. Lines*, — U.S. —, 8 L. ed. 2d 313 (May, 1962). It does not.

The *Salem* case held that expert testimony from a naval architect was not required to enable a jury to decide, upon other testimony and photographs concerning a simple physical structure, whether hand railings should have been provided.

The present case is different.

First, it is an admiralty case. We have no problem of the Court invading the province of the jury. Under *McAllister* v. *United States*, the Court of Appeals may reverse the judgment of the District Court if it is "clearly erroneous." It is clearly erroneous when "although there is evidence to support it, the reviewing court, on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *McAllister* v. *United States*, 348 U.S. 19, 99 L. ed. 20.

Second, this case involves the asserted duty of inspection. And there was simply *no evidence* that an inspection could or should have been made which would reveal the defect.

The defect in the lift gear could not have been discovered by visual inspection or examination. It was apparently latent (Op. Ct. Appeals, Appx. Pet. for Cert., p. 27). (Op. Dist. Ct., note 8, Appx. Pet. for Cert., p. 41).

Thus, whatever the defect was, it could only be discovered by actual operation of using the lift gear to raise or lower the boom. There were ten such sets of gear, all in use by the stevedores. The lift gear had worked properly when used at the last loading port, a few days before, but was found stuck during actual operation when used by the longshoremen the day before the accident. There was no evidence whatever that the ship's officers or crew were aware of the defect. And there was no evidence whatever that the ship's officers or crew could or should have made an operating test of all ten lift gears every twenty-four hours.

The District Court's conclusion of a negligent failure to inspect was supported by no evidence, and was a non-sequitur based only upon the finding that the gear was unseaworthy.[2] The Court of Appeals correctly reversed this clearly erroneous conclusion of the District Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

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---

[2] See the District Court Opinion "That there was a malfunction . . . of the lift gear . . . is self-evident . . . *Therefore*, the Court concludes:
(2) That the respondents and the claimant were negligent. . . ." Obviously, the conclusion of negligence does not necessarily follow from the finding of unseaworthiness. (Op. Dist. Ct. Appx. Pet. for Cert. p. 37).

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In the Supreme Court
of the United States

No. 301, October Term, 1962

GEORGE WEIGEL,

Petitioner,

v.

PARTENWEEDEREI .MS BELGRANO and RUDOLPH A. OETKER,

Respondents.

BRIEF OF THIRD PARTY RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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In the Supreme Court
of the United States

No. , OCTOBER TERM, 1961

GEORGE WEIGEL,

Petitioner,

v.

PARTENWEEDEREI, MS BELGRANO and RUDOLPH A. OETKER,

Respondents,

BRIEF OF THIRD PARTY RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner sets out in his petition for a Writ of Certiorari three reasons why he believes this case merits review by this Court: 1) Determination of the applicability of the warranty of seaworthiness is of importance to a substantial class of workmen. 2) Difficult questions are raised respecting determination of the applicability of the warranty in future cases. 3) The decision of the Court of Appeals conflicts with decisions of this Court and others. The instant case presents none of these questions.

Petitioner was a dock worker. He had no occasion to go aboard the vessel. He had no occasion to handle

ship's gear or equipment (Tr. 472, 473). Cases respecting injuries resulting from unseaworthiness of a vessel to workmen similarly situated to Petitioner will be rare. Such workmen never are aboard and are only intermittently near vessels. Slight exposure to the perils of ships does not lead to frequent injuries. The issue raised by Petitioner is, therefore, of little over-all significance.

Any class of workers would deem it important to be eligible for compensation for injury in excess of state workmen's compensation rates, even for rare and unusual types of accidents. This, however, does not justify consideration of this case by this Court nor would it justify rewriting the law respecting the warranty of seaworthiness to include every workman who merely brings cargo near the ship. Such extension would include taxi drivers bringing passengers, delivery men bringing ship's stores, railroad employees switching cars on the dock; and many other clearly land workmen.

A battle of experts in every case, envisioned by Petitioner, does not follow from the decision of the Court of Appeals. The overwhelming bulk of cases that arise fall clearly within or without the ambit of the warranty of seaworthiness as heretofore defined by this Court and lower courts. Responsible lawyers recognize settled issues and do not litigate them. However, when that rare case arises where a serious question of the applicability of the doctrine is inherent in the facts and is put in issue by counsel, there is no unusual burden on claimant or court to require and receive proof of fact.

The problems of the quantum and nature of proof necessary to justify a finding of applicability of the warranty may be of interest to this Court. These problems are not presented in this case, however, because there was no pertinent evidence whatsoever presented, except evidence tending to negate the warranty.

The decision of the Court of Appeals in this case does not conflict with the decisions of this Court, or of any other court. This Court has treated the availability of the warranty of seaworthiness as a fact question. See, e.g., *United N. Y. & N. J. Pilots* v. *Halecki*, 358 U.S. 613 (1959). The Court of Appeals simply held the petitioner could not prevail on a fact question where no evidence was presented.

Nor is the decision in conflict with *Salem* v. *U. S. Lines*, — U.S. —, 8 L. Ed. 2d 313 (May 28, 1962). In that case expert opinion was held unnecessary to permit a jury to infer a vessel to be unseaworthy for want of hand rails or any other device to assist seamen in passage from a ladder to a crow's nest. Certainly a person of ordinary intelligence with pictures and diagrams before him requires no expert guidance to determine whether a person could safely climb through a particular part of a vessel. That case bears no relevancy to the instant case. In the instant case the trier of fact was given no factual basis to arrive at a standard of what inspection, if any, a prudent shipowner would or should make. He could not be expected to know the customs and problems of shipboard life that dictate to a prudent shipowner the frequency and na-

ture of inspections. No testimony was offered showing what a reasonable inspection is. Consequently, there was no basis for the inference that a reasonable inspection would have revealed the defect. The trial court simply concluded a reasonable inspection was not made from the fact that an accident occurred. *Salem* v. *U. S. Lines*, supra, does not justify such an inference.

A Writ of Certiorari should be denied.

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In the Supreme Court
of the United States

No. 301, OCTOBER TERM, 1962

GEORGE WEIGEL,
Petitioner,

v.

PARTENWEEDEREI, MS BELGRANO and RUDOLPH A. OETKER,
Respondents,

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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In the Supreme Court of the United States

No. 301, October Term, 1962

GEORGE WEIGEL,

Petitioner,

v.

PARTENWEEDEREI, MS BELGRANO and RUDOLPH A. OETKER,

Respondents.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner prays that this Court grant rehearing of its order of October 8, 1962, denying the petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the ~~Second~~ NINTH Circuit in the above-entitled case as prayed for in the petition heretofore filed herein.

REASONS FOR GRANTING THE REHEARING AND ISSUING THE WRIT

At the time of the preparation and filing of the petition for a writ of certiorari herein, counsel for petitioner

were not aware of the decision of the Court of Appeals for the First Circuit in *Waterman Steamship Corp. vs. Gutierrez*, 301 F2d 415 (CA 1, 1962), which was handed down on April 11, 1962. Contemporaneously with its denial of certiorari in the instant case, this Court granted a petition for a writ of certiorari in the *Gutierrez* case, No. 229, October Term, 1962.

The principal issues in the instant case are whether a longshoreman working on the dock is entitled to a warranty of the seaworthiness of the ship's gear, and the extent to which the ship owner is required to furnish a safe place to work to longshoremen working on the dock. In *Gutierrez*, the principal issues are whether a longshoreman working on the dock is entitled to a warranty of the seaworthiness of cargo being unloaded, and the extent to which the ship owner is obligated to provide a safe place to work to longshoremen working on the dock.

The similarity of the issues presented cannot be more clearly demonstrated than by reference to the questions presented for decision in the two cases, as follows:

> *WEIGEL*—"1. Is a longshoreman working on the dock, engaged in moving cargo under the ship's tackle to be loaded aboard the vessel, entitled to a warranty of the seaworthiness of the vessel?"
>
> *GUTIERREZ*—"A. Is the ship owner liable for injuries suffered by a shore-based longshoreman who is participating in the unloading operations of the ship at the time of injury?
>
> This question comprises the subsidiary questions

of (1) whether longshoremen engaged in the ship's service are entitled to the doctrine of unseaworthiness while working on shore as they are while working aboard; and, (2) whether liability of the shipowner extends to injuries occurring on shore proximately caused by unseaworthy cargo aboard or by its negligent discharge."

WEIGEL—"3. Does a ship owner owe a duty to a longshoreman working on the dock, engaged in moving cargo under the ship's tackle to be loaded aboard the vessel, to provide him with a safe place to work?"

GUTIERREZ—"B. Does the ship owner's liability for negligence terminate at the edge of the pier?

Subsidiary issues comprised in this question include the foreseeability of injury to one not aboard the vessel; the responsibility even though the area where the injury occurred is not within his power and control; and the scope and the extent of the shipowner's continuing duty to provide a safe place to work."

The similarity of the issues is further demonstrated by the fact that, in *Gutierrez*, the First Circuit placed its chief reliance upon the decision of the Ninth Circuit in this case, stating, at 301 F2d 417:

"A recent case somewhat close on the facts is Partenweederei MS Belgrano v. Weigel, 9 Cir., 1962, 299 F.2d 897. There libelant was a dock worker engaged in driving a tractor handling lumber on

> the dock which was about to be loaded onto respondent's vessel. He was struck by a defective ship's boom. The court found that libelant was not performing traditional ship's work within the scope of the obligation of seaworthiness. While the court noted a distinction between cargo not yet connected with the ship's loading gear and cargo actually being loaded, it is in common with us in recognizing limits in this area to principles of absolute liability. *In a way the facts were more favorable to libelant than in the case at bar because it was the ship's gear that was defective and not merely cargo previously aboard.*" (Emphasis supplied.)

If, as the First Circuit suggests, the facts in *Weigel* are stronger in favor of the workman than the facts in *Gutierrez*, a reversal of *Gutierrez* would indicate a reversal of *Weigel* as well. In any event, the cases present closely related problems, and should be considered together upon these issues. At the very least, a final ruling upon *Weigel* should await the outcome of *Gutierrez* since the decision in *Gutierrez* cannot help but affect the result in *Weigel* if the above-quoted "Questions" are ruled upon by this Court.

Petitioner submits that the granting by this Court of a writ of certiorari in *Gutierrez* is an intervening circumstance of substantial or controlling effect which justifies the reconsideration by this Court of the petition for writ of certiorari in this case. Cf., *Bowden* v. *Fort Smith*, 316 U.S. 584, 589 (1942), in which this Court, for similar reasons, vacated its prior denial of certiorari on its own motion.

CONCLUSION

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Ninth Circuit.

Respectfully submitted.

CLIFFORD D. O'BRIEN
Counsel for Petitioner

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

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